

Will the IRS Silence Free Speech in 2016?

The IRS is attempting to issue a rule that would redefine the meaning of political activity to allow the government to regulate free speech and redefine the discussion of issues as electioneering. If the rule is enacted, then non-profit organizations – including, but not limited to, educational institutions, policy advocacy groups, labor unions, and business leagues – could be prohibited by their tax status from engaging in what is now constitutionally protected free speech.

The proposed rule (REG 134417–13) is staggeringly broad. Any communication that even named an elected official during election season could be considered electioneering. It could prevent education and advocacy groups from discussing issues when the public is considering them, and prevent advocacy groups from criticizing the voting behavior of politicians.

It is the most radical move to protect politicians from public criticism proposed in decades.

Even more radically, the rule would define any reference to a candidate by name that remained on a nonprofit's website during election season as electioneering; that during the candidate's election season, organizations must "search and destroy" any content that names or even references a candidate or a candidate's position on an issue. This would require organizations to determine in every election, anywhere in the United States, whether any individual who is named on their website is running for office.

Congress de-funded the rule through Fiscal Year 2016, but IRS Commissioner John Koskinen has announced the IRS intends to resume rule-making in October.

Doing so would put the IRS in direct conflict with the landmark Supreme Court decision, NAACP v. Patterson; eliminate the political freedom of non-profit organizations; lay the groundwork for further speech restrictions, and effectively silence hundreds of thousands of organizations that discuss, analyze, or advocate for public policy.

Congress should act immediately to protect the right of private associations to engage in political speech, by passing legislation to positively define "political activity" to mean only express advocacy and electioneering.

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